BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

ROBERT G. MCCURDY Claimant VS. **EVCON INDUSTRIES, INC.** Respondent AND **ST. PAUL FIRE & MARINE INSURANCE CO.** Insurance Carrier AND **KANSAS WORKERS COMPENSATION FUND**	Docket No. 168,736

ORDER

The Application of the respondent for review by the Workers Compensation Appeals Board of an Award entered by Special Administrative Law Judge William F. Morrissey on May 4, 1994, came regularly on for oral argument in Wichita, Kansas.

APPEARANCES

Claimant appeared by and through his attorney, James B. Zongker of Wichita, Kansas. Respondent and its insurance carrier appeared by and through their attorney, Vincent A. Burnett of Wichita, Kansas. The Kansas Workers Compensation Fund appeared by and through its attorney, Orvel B. Mason of Arkansas City, Kansas. There were no other appearances.

RECORD

The record as specifically set forth in the Award of the Administrative Law Judge is herein adopted by the Appeals Board.

STIPULATIONS

The stipulations as specifically set forth in the Award of the Administrative Law Judge are herein adopted by the Appeals Board.

ISSUES

(1) Whether the Administrative Law Judge erred in failing to deny compensation to the claimant based upon claimant's intoxication at the time of the injury.

(2) Claimant's average weekly wage.

(3) The nature and extent of claimant's injury and disability.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein and, in addition, the stipulations of the parties, the Appeals Board makes the following findings of fact and conclusions of law:

Claimant, a fabricator or set-up operator, had been employed with the respondent for over twelve (12) years. On February 21, 1992 while filling an oil bath, claimant was struck on the right wrist and hand by the lid of the bath. He was treated by Dr. Mark Melhorn for approximately two months and then released and returned to work. He continued having significant problems with his right hand and wrist, including difficulty gripping, pushing, pulling or twisting with the right hand.

On July 31, 1992 while operating a forklift, a seven thousand (7,000) pound coil on the front of the claimant's forklift slipped off the forklift forks, causing the lift to buck violently. Claimant was slammed against the steering wheel and then back against the forklift seat causing injury to his chest, middle and lower back and right leg. Claimant was removed from the premises by stretcher and taken by ambulance to the hospital.

While in the emergency room, Dr. Daria Davidson noted an odor of alcohol about claimant and obtained a blood alcohol sample. The test indicated claimant had a blood alcohol level of .08. This was approximately thirty-five (35) minutes after the time of injury.

On the date of claimant's injury, K.S.A. 1992 Supp. 44-501(d) stated in part:

> "If it is proved that the injury to the employee results . . . substantially from the employee's intoxication, any compensation in respect to that injury shall be disallowed."

On July 1, 1993, the Kansas Legislature substantially modified K.S.A. 44-501(d)(2) as follows:

> "The employer shall not be liable under the workers compensation act where the injury, disability or death was contributed to by the employee's use or consumption of alcohol or any drugs, chemicals or any other compounds or substances including but not limited to, any drugs or medications which are available to the public without a prescription from a health care provider . . . It shall be conclusively presumed that the employee was impaired due to alcohol if it is shown that at the time of the injury that the employee had an alcohol concentration of .04 or more."

Claimant argues the modification of K.S.A. 44-501(d) was a substantive modification in that it has a direct effect on the claimant's rights. Respondent on the other hand argues that this modification is procedural and the new language should be effective in this instance. The law, with regard to statutory operation, is well set out in Kansas.

> "A statute operates prospectively unless its language clearly indicates that the legislature intended that it operate retrospectively . . . ." Harding v. K.C. Wall Products, Inc., 250 Kan. 655, 666, 831 P.2d 958 (1992).
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> "An exception to the fundamental rule is that if the statutory change does not prejudicially affect the substantive rights of the *parties* and is merely procedural or remedial in nature, it applies retroactively." State v. Hutchison, 228 Kan. 279, 287, 615 P.2d 138 (1980); State v. Chapman, 15 Kan. App. 2d 643, 645, 814 P.2d 449 (1991).

The question here is whether the rights and obligations set out in K.S.A. 44-501 are substantive or procedural. The modification in K.S.A. 44-501 directly affects claimant's right to an award of benefits under the Workers Compensation Act in Kansas. There is no indication by the legislature that it intended for K.S.A. 44-501 to operate retrospectively. It also appears that the change does have a prejudicial effect upon the substantive rights of the claimant in collecting workers compensation benefits. The Appeals Board finds that the modifications in K.S.A. 44-501, as they relate to the respondent's right to deny benefits to claimant based upon the intoxication defense, are a substantive right and the law in effect at the time of the injury is applicable to this matter.

Claimant was found to have a blood alcohol level of .08 at the time he was examined in the hospital, approximately thirty-five (35) minutes after the injury. While Dr. Davidson opined claimant was impaired at the time of the accident and went on to say that she felt claimant's ability to respond to external stimuli would have been affected by this level of alcohol, there was no testimony in the record indicating that the claimant's injury resulted substantially from claimant's intoxication. The Appeals Board finds insufficient proof that claimant's injury resulted substantially from claimant's intoxication.

The Appeals Board finds the claimant's average weekly wage to be $730.89, including the value of fringe benefits furnished to claimant. Respondent argues that the fringe benefits should not be included in the computation of the average weekly wage because of the reasoning of the United States Supreme Court in of District of Columbia v. Greater Washington Board of Trade, 113 S.Ct. 580, 121 Law Ed.2d 513 (1992) where the Supreme Court found that ERISA preempts certain state laws and regulations relating to employee benefits. The Appeals Board has previously considered this issue and held in Richardson v. Wichita Arms, Inc./CIGNA, Docket No. 176,396 (August 1994), and in Crump v. Evcon Industries, Inc./St. Paul Fire & Marine Insurance Company and the Kansas Workers Compensation Fund, Docket No. 172,079 (February 1995), that the inclusion of fringe benefits in the average weekly wage, as mandated by K.S.A. 44-511, is not the type of rule or regulation intended to be preempted by ERISA. The Kansas Appellate Courts have not ruled to the contrary on this issue, and, accordingly, the Appeals Board continues to adhere to its originally stated position and finds, in this case, the fringe benefits may and should be included in the claimant's average weekly wage. As such, the average weekly wage found by the Special Administrative Law Judge of $730.89 is appropriate.

K.S.A. 1992 Supp. 44-510e(a) provides:

> "There shall be a presumption that the employee has no work disability if the employee engages in any work for wages comparable to the average gross weekly wage that the employee was earning at the time of the injury."

As claimant has been unable to return to work at a comparable wage, the Appeals Board finds presumption in K.S.A. 1992 Supp. 44-510e does not apply and claimant is entitled to a work disability.

K.S.A. 44-501(a) states in part:

> "If in any employment to which the workers compensation act applies, personal injury by accident arising out of and in the course of employment is caused to an employee, the employer shall be liable to pay compensation to the employee in accordance with the provisions of the workers compensation act."

K.S.A. 1992 Supp. 44-510e(a) states in part:

> "The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the ability of the employee to perform work in the open labor market and to earn comparable wages has been reduced, taking into consideration the employee's education, training, experience and capacity for rehabilitation, except that in any event the extent of permanent partial general disability shall not be less than percentage of functional impairment."

In evaluating claimant's ability to earn a comparable wage, the Appeals Board finds, for reasons stated below, that the opinion of Karen Terrill is persuasive and adopts same. Ms. Terrill opined claimant was capable of making $8.79 per hour post-injury, which equates to a $351.60 weekly wage. Ms. Terrill compared this wage to the claimant's $12.60 per hour wage at the time of the injury, which excludes certain benefits to which claimant was entitled. The Appeals Board finds the appropriate method of computation would be to compare claimant's current wage-earning capabilities to the average weekly wage found by the Appeals Board to be appropriate. In comparing the $351.60 wage potential of claimant post-injury, to the average weekly wage of $730.89 per week, the Appeals Board finds claimant has suffered a fifty-two percent (52%) loss of ability to earn a comparable wage as a result of the injuries suffered while employed with respondent on July 31, 1992. In evaluating claimant's ability to obtain work in the open labor market and earn a comparable wage, Karen Crist Terrill found, based upon the restriction of Dr. Paul D. Lesko, that claimant had suffered a one percent (1%) or less labor market access loss. Based upon the restrictions placed upon the claimant by Dr. Schlachter, Ms. Terrill opined claimant had suffered a forty percent (40%) labor market access loss.

Claimant was also evaluated by Mr. Jerry Hardin. Mr. Hardin opined claimant had suffered a sixty to sixty-five percent (60-65%) labor market access loss based upon the restrictions placed upon the claimant by Dr. Schlachter. He also opined claimant had suffered a twenty to twenty-five percent (20-25%) labor market access loss as a result of the restrictions placed upon claimant by Dr. Lesko. Dr. Lesko placed numerous weight restrictions on the claimant, including level lifting of one hundred and twenty-two (122) pounds occasionally, eighty-two (82) pounds frequently; knuckle-to-shoulder lifting of seventy-two (72) pounds maximum, with an occasional lift of fifty-two (52) pounds; overhead lifting occasionally of fifty (50) pounds, frequently of forty (40) pounds; squat lifting, maximum of seventy-two (72) pounds occasionally, fifty-two (52) pounds frequently. Mr. Hardin felt that the fifty (50) pound limitation, which was the lightest limitation placed on claimant by Dr. Lesko, was appropriate and utilized same in his evaluation of claimant's loss of access to the open labor market. This overly restrictive evaluation forces the Appeals Board to reject Mr. Hardin's opinion as being not credible and not based upon an equitable evaluation of the evidence in the record. The Appeals Board finds the opinion of Karen Terrill persuasive and adopts same.

In determining the extent of permanent partial disability, both the reduction of claimant's ability to perform work in the open labor market and the ability to earn comparable wages must be considered. "The statute is silent as to how this percentage is to be arrived at, and, absent any indication as to how this is to be accomplished, we

cannot say that the district court erred in the method adopted and applied in the instant case." Hughes v. Inland Container Corp., 247 Kan. 407, 799 P.2d 1011 (1990).

While Hughes indicates a balance of the two factors is required, it does not specifically state how this balance is to occur or what emphasis is to be placed on each of the tests. In Hughes the Court determined that giving each element equal weight and averaging the two to arrive at a percentage was an appropriate method of procedure.

The Appeals Board can find no reason in this case to place greater emphasis on one element over the other and, as such, finds each should be given equal weight. The Appeals Board adopts the medical opinion of Dr. Lesko as it appears to be supported by the weight of the credible evidence. The Appeals Board finds that claimant has suffered a one percent (1%) loss of access to the open labor market. In balancing the claimant's loss of access to the open labor market with his loss of ability to earn a comparable wage, the Appeals Board finds claimant has suffered a twenty-six and one-half percent (26.5%) permanent partial work disability as a result of injuries suffered on July 31, 1992.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Special Administrative Law Judge William F. Morrissey, dated May 4, 1994, shall be, and hereby is, modified in part, in that the claimant, Robert G. McCurdy, is awarded compensation against the respondent, Evcon Industries, Inc. and its insurance carrier, St. Paul Fire & Marine Insurance Company, and the Kansas Workers Compensation Fund for an injury suffered on July 31, 1992 for a twenty-six and one-half percent (26.5%) permanent partial disability.

Per the stipulation of the parties, the Kansas Workers Compensation Fund shall be responsible for payment of forty-five percent (45%) of all past, present and future compensation, medical expenses and costs in this matter.

Claimant is awarded 19 weeks temporary total disability compensation at the rate of $299.00 per week in the sum of $5,681.00, followed thereafter by 396 weeks permanent partial general disability compensation at the rate of $129.13 per week in the sum of $51,135.48 for a total award of $56,816.48.

As of March 17, 1995, there would be due and owing to claimant 19 weeks temporary total disability compensation at the rate of $299.00 per week, in the sum of $5,681.00, followed by 118.14 weeks permanent partial disability, at the rate of $129.13 per week, in the amount of $15,255.42, for a total of $20,936.42 due and owing in one lump sum, minus any amounts previously paid, followed thereafter by 277.86 weeks permanent partial disability compensation at the rate of $129.13 per week, totaling $35,880.06 until fully paid or until further order of the Director.

Future medical is awarded, upon proper application to and approval by the Director.

Unauthorized medical up to $350.00 is ordered paid to claimant upon presentation of an itemized statement verifying same.

Claimant's attorney fee contract is hereby approved, insofar as it is not inconsistent with K.S.A. 44-536.

The fees necessary to defray the expense of the Kansas Workers Compensation Act are hereby assessed fifty-five percent (55%) against the respondent and its insurance carrier and forty-five percent (45%) against the Kansas Workers Compensation Fund to be paid as follows:

William F. Morrissey	
Special Administrative Law Judge	$150.00
Barber & Associates	
Transcript of Preliminary Hearing	$123.80
Deposition of Jerry Hardin	$328.60
Deposition of Ernest Schlachter, M.D.	$147.00
Ireland Court Reporting	
Deposition of Karen Terrill	$211.96
Deposition of Paul Lesko, M.D.	$154.67
Deposition of Dr. Daria Davidson	$161.47
Kelley, York & Associates, Ltd.	
Deposition of Robert McCurdy	$483.93

IT IS SO ORDERED.

Dated this ____ day of March 1995.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: James B. Zongker, Wichita, KS
Vincent A. Burnett, Wichita, KS
Orvel B. Mason, Arkansas City, KS
William F. Morrissey, Special Administrative Law Judge
George Gomez, Director